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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 12, Original.

STATE OF WISCONSIN

vs.

ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR.

BRIEF AND ARGUMENT FOR COMPLAINANT.

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Statement of Facts.

This is a suit in equity brought by the State of Wisconsin to enjoin, conformably to act of Congress of March 2, 1901 (31 Stat., 950), the Secretary of the Interior of the United States from interfering with the use, possession, and enjoyment by the State of Wisconsin and its grantees of any part of sections 16 of the lands described in the bill and formerly included in territory of the Chippewa Indians in Wisconsin, and to decree the title of such lands to be in the State of Wisconsin.

The undisputed facts are set up in the amended original bill filed in this court, to which the defendant has filed its general demurrer, etc.

The State claims these lands as school lands; the Secretary of the Interior claims them, as the representative of the United States, on behalf of the La Pointe and other bands of the Chippewa Indians.

The solution of the question of title depends upon the force and effect of the acts of Congress for the admission of Wisconsin into the Union as a State; the grant to the State, in the organic act, of section sixteen of each township of public land for the use of schools, and the force and effect of certain treaties of the United States with the Chippewa Indians, one made in 1843, preceding the grant to the State, and the other in 1854, subsequent to the grant to the State.

Prior to March 28, 1843, almost the entire northern half of the territory of the present State of Wisconsin, including all the lands lying between Lake Superior on the north, Green bay and Fox river on the east, the latitude of Plover-Portage on the Wisconsin river on the south, and the Mississippi on the west, was *unceded* Chippewa Indian land. The tribe of Chippewa Indians were recognized as having two main divisions—*i. e.*, Chippewas of Lake Superior and Chippewas of the Mississippi—and consisting of a number of bands apparently designated by certain rendezvous, such as "L'Anse et Vieux de Sert," "Fond du Lac," "La Pointe," &c., bands.

On March 28, 1843, a treaty was concluded between the United States and both the Chippewas of Lake Superior and of the Mississippi, whereby said tribes, in consideration of a large sum of money and merchandise presently paid and large annuities to be thereafter paid, *ceded* to the United

States, without reservation or exception save as hereinafter stated, all their lands within the then Territory and thereafter State of Wisconsin, embracing what had constituted the more especial country of the Chippewas of Lake Superior. Provision was made therein for a division of the annuities under that treaty, as well as the annuities under a treaty of 1837 with the Chippewas of Mississippi, among the members of both branches of the tribe.

By article 2 of said treaty the Indians stipulated for the right of hunting on the ceded territory, with the other usual *privileges* of occupancy, until required to remove by the President of the United States

By article 3 of said treaty it is provided that all the *unceded* lands belonging to the Fond du Lac, Sandy Lake, and Mississippi bands should be *the common* property and *the home of all the Indians* parties to the treaty.

In article 5 of the treaty the right of all the Chippewa Indians of all branches and bands *to hold the* UNCEDED *lands in common* is recognized.

By section 7 of an act of Congress "to enable the people of Wisconsin Territory to form a constitution and State government, and for the admission of such State into the Union, approved August 6, 1846," it was enacted that certain propositions therein recited be submitted to the convention which should assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection, and if accepted by said convention and ratified by an article in such constitution to be obligatory on the United States, among which propositions was the following:

"That sections numbered 16 in every township of the public lands in said State, and where such section has been sold

or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

On February 1, 1848, the constitutional convention of the people of said Territory adopted a constitution, thereafter ratified by vote of the people on the 2d day of March, 1848, in accordance with the aforesaid enabling act. By section 2 of article 2 of such constitution all the propositions of the enabling act of Congress aforesaid were accepted, ratified, and confirmed.

By an act of Congress of the United States approved March 29, 1848, the State of Wisconsin was admitted into the Union on an equal footing with the original States in all respects, with boundaries as described in said act, including all of the lands described in the bill of complaint herein.

On September 30, 1854, the United States made another treaty with both branches of the Chippewa Indians, in which *it promised* "to set apart and withhold from sale" six separately mentioned tracts or so-called tracts of lands for the use of different bands or groups of such Indians.

Subdivision 2 of article 2 of said treaty reads as follows:

"For the use of the La Pointe band and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior a few miles west of the Montreal river at the mouth of a creek called by the Indians 'Ke-che-se-be-we-she;' running thence south to a line drawn east and west through the center of township 47 north; thence west to the west line of said township; thence south to the southeast corner of township 46 north, range 2 west; thence west the width of two townships; thence north the width of two townships; thence west one

mile; thence north to the lake shore and thence along the lake shore, crossing Shag-waw-me-quon point, to the place of beginning."

And also two hundred acres on the northern extremity of the Madeline island for a fishing ground.

By subdivision 3 of said article 2 there was to be set apart and withheld from sale "for the other Wisconsin bands a tract of land lying about Lac du Flambeau, and another tract on Lac Court Orielles, each *equal in extent* to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President."

The lands above and in subdivisions 2 and 3 of said treaty mentioned all lie within the territory ceded to the United States by the Indians in 1843.

The sections 16 involved in this case as to one group lie within the outer boundaries of the land agreed to be set apart for the La Pointe band, under the treaty of 1854, and as to the other within the Lac du Flambeau reservation made in 1866, under said treaty of 1854.

Article 3 of said treaty provides that the United States shall define the boundaries of the reserved tracts, whenever it might be necessary, by actual survey, and that the President may from time to time, at his discretion, cause the whole to be surveyed, and assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use, and at his discretion, as fast as the occupants became capable of transacting their own affairs, *issue patents to such occupants*, with such restriction of the power of alienation as he may see fit to impose, and make

rules respecting *the disposition of the lands* in case of the death of the head of the family or single person occupying the same or in case of abandonment by them. The President was also given authority by said article 3 to assign other lands in exchange for mineral lands, if any such were found in the tracts set apart, and was also given power to "*make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights.*"

Subdivision 7 of article 2 of the treaty of 1854 provides that "each head of a family or a single person over twenty-one years of age at the present time, of the mixed blood, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form."

The other articles of said treaty provided for additional payments to the Chippewas of Lake Superior for the lands ceded thereby, and prescribed sundry regulations of the conduct of the Indians on the lands set apart, and for the distribution of annuities, etc.

All of the lands mentioned in subdivisions 2 and 3 of article 2 of said treaty of 1854 to be set apart by the United States for the several bands of Chippewa Indians were included and embraced in the lands ceded to the United States by the treaty of 1843, and were lands in which the State of Wisconsin had, under the enabling act and State constitution, become entitled to every sixteenth section.

The lands described in subdivision 2 of article 2 of said treaty of 1854 to be set apart to the La Pointe band embraced

in their general outline townships 46 and 47 north of ranges 2 and 3 west and portions of township 48 north, range 3 west, including section 16, and a portion of township 47 north, range 1 west, including section 16.

In the year 1847 the east line of township 46 north, range 2 west, and the west line of township 47 north of range 1 west were duly surveyed by the United States. In 1852 all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west, and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times in the years 1856, 1858, and 1873.

Of the lands claimed to be within the Flambeau Indian reservation surveys were made under the direction of the United States as follows: In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860, the east line of towns 40 and 41, 4 east; in September, 1861, the south, east, and west lines of towns 40 and 41, 5 east; in August, 1864, the south and west lines of townships 40 and 41, 4 east, *and in July, 1865*, each of said townships was subdivided by survey into sections. On June 27, *1866*, the lands now claimed to be within the reservation of said Wisconsin bands about Lac du Flambeau were, by orders of the Commissioner of the General Land Office and of the Secretary of the Interior, withdrawn from sale, to be held in reservation for the purposes contemplated by said treaty. No further or later action was taken by the United States in regard to said Lac du Flambeau reservation, and said reser-

vation has been hitherto claimed by said Wisconsin bands under the terms of the aforesaid order of June 27, 1866. Exhibit A of the bill of complaint is a copy of all of the executive orders made in regard to the last-named reservation.

No withdrawal and setting apart of land about Lac Court Orielles for other Wisconsin bands of the Chippewa Indians under the provisions of subdivision 3 of article 2 of the treaty of 1854 took place until November 22, 1859, and April 4, 1865, and the permanent reservation of such lands was not made until March 1, 1873, by order of C. Delano, Secretary of the Interior of the United States. In this last-named reservation *no sections 16 were selected,* and Exhibit B annexed to the bill of complaint is a copy of all of the executive orders relating to the last-named reservation.

The facts in regard to the last-named reservation are set out in the bill of complaint for the purpose of showing the later construction which the Department of the Interior gave to the provisions of the treaty of 1854 as affecting school lands within the reservation.

There has never been any formal setting apart by the United States, since the treaty of 1854, of the La Pointe reservation. It seems to have been assumed that the agreement in the treaty to set apart a not yet fully surveyed tract was a setting apart and reserving of the same.

Neither the boundaries nor the description of the lands to be embraced in the Lac du Flambeau and Lac Court Orielles reservations were fixed or determined by the United States until after the lands embraced within such reservations had been surveyed and subdivided into sections and until after the title to sections 16 had absolutely vested in the State of Wisconsin.

In the case of the Lac Court Grielles reservation, where sections 16 were excluded, the United States Indian agent in his letter of February 17, 1873 (Exhibit B, bill), states this selection to be "satisfactory to the Indians, *fulfilling the spirit of the treaty* under which it is made, and fully securing the interests of the General Government as well *as those of the State of Wisconsin.*"

The State of Wisconsin has ever since its admission into the Union claimed *the right* to the fee of all sections 16 in the territory ceded by the Chippewa Indians in the treaty of 1843, and has since the survey of said lands claimed the fee thereof. It has exercised dominion and ownership of the same, has issued patents to divers parties on all such sections within the outer boundaries of the La Pointe reservation, and on all but twenty-nine forties of such sections within the outer boundaries of the Flambeau reservation. Taxes have been assessed and improvements made and timber cut on such sections, without interference on the part of the United States, until about the year 1899, when the defendant, the present United States Secretary of the Interior, set up a claim thereto on behalf of the Indians and forbade the cutting of timber by the grantees of the State. Under the treaty of 1854 the Secretary of the Interior has divided up the lands in these reservations among the Indians in allotments of eighty acres; patents have been issued to the allottees, who have become full citizens of the United States, have terminated their tribal relations, and have ceased to occupy any material part of the reservations in common. The lands in the reservation are ample, excluding sections 16, to secure to each individual Indian eighty acres in severalty, as far as

the same has hitherto been claimed. Notwithstanding more than fifty years have passed since the making of the treaty under which the defendant now asserts a right in these Indians, *no allotment has ever been made to any member of the tribe of any part of any section 16.*

The value of the lands in dispute is about $50,000.

The State of Wisconsin, by chapter 95, Laws of 1903, authorized the commencement of this action. All of the foregoing facts are admitted by the demurrer of the defendant.

ARGUMENT.

I.

The cession of the Chippewa territory in Wisconsin in 1843 conveyed the WHOLE *Indian* TITLE *and* RIGHT *of occupancy.*

The treaty contains terms the equivalent of terms of conveyance in a deed, viz., "the Indians *cede* to the United States *all* the country within the following boundaries," &c. The consideration is named and paid, to wit, a large sum in cash and merchandise and annuities for twenty-five years.

What did the United States get out of the treaty if not a relinquishment of the Indian title, which title was a *right* of *occupancy?* Prior to the treaty there was a *right* in the Indians practically in perpetuity which the United States *would not* terminate otherwise than by purchase. After purchase nothing remained to the Indians but a *permissive temporary occupancy,* a license to hunt and have the *privileges,* not the rights, of occupancy pending their removal to their

homes on the *unceded* lands spoken of in articles 3 and 5 of the treaty.

Is it possible that such permission to exercise such *temporary privileges* constituted "a legal impediment" within the meaning of the authorities to the grant by the United States to the State of an unencumbered *jus ad rem*" in sections 16 to be thereafter made definite by survey?

Can land in such relation to the United State be said to be such as "has been sold or otherwise disposed of" within the meaning of the provision in the school-land grant for substitution of other lands for section 16?

Was there after this cession of 1843 and up to the time the compact with the State became operative and binding any claim whatever on the United States to *reserve to the Indians any part of the ceded territory?*

If this permissive temporary occupancy was an encumbrance on the title from the United States to the State, then it was an encumbrance on every other part of the great domain, and from 1848 until 1854 or 1855 the State of Wisconsin had practically no jurisdiction over nearly half of its area, and the United States no right to dispose of any of the ceded land any more than unceded Indian land, which latter it has been uniformly held it would not take from the Indians except by purchase.

It is to be borne in mind that none of these sections were ever specifically occupied as the home of any member of any tribe, nor as part of any settlement or headquarters of any tribe, and had neither shanty, wigwam, or other improvements, nor even the crude tillage of the savage on any part of the same, but were mere undesignated spots of negligible extent and relation in the midst of a vast domain, a hundredth

part of which was ample for the Indian occupation contemplated by the treaty.

There can be no doubt that these Indians parted with every vestige of claim, legal, equitable, or as wards of a nation, to each and every parcel of the land embraced within the treaty, except a license to wander over any part which the United States failed otherwise to dispose of, until ordered by the President to get off. It is preposterous, however, to assume that the United States was, by such a stipulation for temporary occupancy, disabled from or fettered in making a disposition of *specific portions of the lands.*

Such a privilege of temporary Indian occupancy was expressly considered by this court in the case of Ward *vs.* Race Horse, 160 U. S., 504, and held to be destroyed and terminated by the mere act of admitting the State (Wyoming) into the Union. It is characterized by the court (p. 510) as "temporary and precarious" and not in any way to stay the advance of settlement and improvement or the jurisdiction of the newly created State over the Territory. Although not expressly overruling the *ex parte* decision in U. S. *vs.* Thomas, the principles announced are incompatible with the language relied upon by the Government in the Thomas case.

The history of the case of U. S. *vs.* Thomas is most peculiar.

Thomas, a Chippewa Indian, was convicted in the United States circuit court for the western district of Wisconsin of a murder alleged to have been committed on the La Court Orielles (Chippewa) Indian reservation. A motion to set aside the conviction, on the ground that it appeared that the crime was committed on section 16 of one of the townships within the reservation, and that, such section 16 being school land, the State had exclusive criminal jurisdiction over the

locus, was made, and, the district and circuit judges differing on the question of jurisdiction, that question was certified to this court.

There was *no appearance or argument* for Thomas nor on behalf of the claim of the State, while the United States solicitor argued in support of the jurisdiction. The hearing was therefore wholly *ex parte*, and has no value as *stare decisis* nor as a judicial opinion except to make lawful the *hanging* or life imprisonment of Thomas. The maxim *audi alteram partem* is of the essence of judicial determination in creating a precedent or rule for future guidance.

The wisdom of the maxim and its application is strikingly exemplified in that case, as it now appears as a *verity* in *this* case that *there are no sections 16 in the La Court Orielles* reservation, as section 16 in each of the townships from which the reservation is made up *is excluded therefrom.* (See Exhibit B, amended bill, schedule of lands in that reservation.)

The learned writer of the opinion in that case could not have had his attention called to the peculiar and limited character of the reserved privilege of temporary occupancy until removal to their *home* in the unceded lands beyond the Mississippi, or he would not have given such hunting and the like privileges the force of the original occupancy right and title, which right had been purchased and paid for by the United States.

The uncertainty of conclusions based on *ex parte* presentation is further shown in numerous other erroneous assumptions of fact in the opinion. The writer of the opinion was aided to a conclusion (p. 582) "that it was not contemplated that *any section* should be left out of any one" of the townships by his statement that "the land reserved was to be *as*

near as possible in a compact form," &c. Not only is nothing of that kind mentioned in the treaty, but the fullest latitude is given as to delineation, providing merely that "the tracts *shall equal in extent"* so many township or so many acres, as the case may be (subdiv. 2 and 3, art. 2, treaty). Again, on page 584 it is assumed that the surrender of the so-called right of occupancy, which is a misnomer, and the cession of "large tracts of land *in Wisconsin"* was a condition or consideration to the United States from the Indians for the reservations, whereas an examination of article 1 of the treaty discloses that no lands whatever *in Wisconsin* were ceded, and by article 4 of the treaty that the *consideration* for the cession was *money and merchandise.* Many other errors of *omission* of pertinent facts might be mentioned, but enough has been said to emphasize our claim that the Thomas case cannot be deemed an adjudication of the question involved here.

We discuss that case at some length for the reason that counsel for the Government, in view of the particular treaties in question here being discussed in the Thomas case, concludes his brief with this case, not only as the cap-sheaf of his argument, but as conclusive in the premises if all his other cases are beside the question.

II.

The United States, having the complete title to the land, unincumbered by anything but a temporary license to hunt, &c., over it, when Wisconsin was admitted as a State, could not after its specific grant to the State make such license a basis or consideration for creating an adverse title, whether the land were surveyed or not at the time of the grant.

From 1843 to 1854 there was no Chippewa Indian reservation or country in Wisconsin. It had *all been ceded* by the treaty of 1843. The members of the tribe hunted and fished over it merely by sufferance. The United States had and exercised the right during that period, at will, to dispose of any portion to settlers or otherwise, and in 1848 contracted with and granted to the new State of Wisconsin, for school purposes, practically one thirty-sixth of the territory covered by the cession of 1843 and not previously disposed of, by apt and adequate designation, as each sixteenth section, although not in every case delineated by survey. The *right* of Wisconsin to the land covered by such grant thereupon became absolute; the *legal title* awaited the survey, but the *jus ad rem* arose simultaneously with the birth of the State.

Beecher *vs.* Wetherby, 95 [redacted]., 524.

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In 1854, with a then practically unlimited domain out of which to satisfy the request and desire—not the right—of some of the Chippewa bands, for such a modification of the treaty of 1843 as would enable them to remain east of the Mississippi, can it be said that the United States was at liberty to assign or set apart to such bands particular lands which n

the meantime it had by the highest and most solemn form of contract dedicated to the State of Wisconsin?

Counsel for the Government cite many cases on uncontested propositions running parallel but not touching complainant's specific contentions nor upon the lines of the present case. It is true that they have quoted fragmentary passages from the Heydenfeldt case (93 U. S., 634) and the Minnesota case (185 U. S., 373), which seem at first blush at variance with complainant's view, but, in so far as the former case is in conflict with the Beecher case (95 U. S., 524), it must be deemed overruled by the latter, and a critical examination of the Minnesota case will make it clear that not only does it not change the principles adjudicated in the Beecher case, but reaffirms them.

Leaving out of consideration the Thomas case, heretofore discussed, this case must be ruled by the case of Beecher *vs.* Wetherby, *supra,* for the reason that every *essential* element in the decision of that case is present in the case at bar.

The Heydenfeldt case was distinctly before the court when the Beecher case was decided. It had been but shortly before heard, and was cited on the brief of counsel. The distinction between the two cases was so obvious that the court does not deem it necessary to distinguish between them in his opinion

In Beecher *vs.* Wetherby the *title* was directly in issue. The plaintiff claimed under a U. S. patent issued to him in 1872 pursuant to an act of Congress of February 6, 1871 (16 Stat., 404), directing the sale of lands in the two townships set apart for the use of the Munsee and Stockbridge Indians, *including the section 16 in question;* the defendant claimed under a patent from the State in 1870, as part of its school lands. "The question for determination was which

of the two classes of patents transferred the title" (95 U. S., 522).

The exterior lines of the townships were run in 1852, the section lines in 1854, both *subsequent* to Wisconsin's admission into the Union (95 U. S., 519).

In January, 1849, the Menominee Indians ceded by treaty, ratified on that day, all their lands in Wisconsin, including those involved in the action, with a stipulation that they should be permitted to remain on the ceded lands until the President should notify them that the same was wanted (95 U. S., 518).

On February 1, 1853, the Wisconsin legislature gave their assent to the Menominees remaining in Wisconsin on the tract of land set apart for them, covering the tract in question, and by treaty between the Menominees and the United States, a specific tract of land, including the land in question, was set aside to the former *as their permanent home,* it being recited that on account of the great unwillingness of the Indians to remove west of the Mississippi the President had consented to their locating temporarily upon the Wolf and Oconto rivers.

The court upheld the State patent as against the United States patent, using the following language, quoted not only with approval, but as authority, in most of the cases cited in the Government's brief in this case, including the recent case of Minnesota *vs.* Hitchcock (185 U. S., 390):

"It was, therefore, an *unalterable* condition of the admission, *obligatory* upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely

promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. *In either case* (survey or no survey), the lands which might be embraced within those sections were *appropriated* to the State. *They were withdrawn from any other disposition,* and set apart from the public domain, so that *no subsequent law authorizing a sale of them could be construed to embrace them, although they were not specially excepted.*

"All that afterwards remained for the United States to do with them, and *all that could be legally done under the compact* was to identify the sections by appropriate surveys. THEY COULD NOT BE DIVERTED FROM THEIR APPROPRIATION BY THE STATE."

Later on in the opinion the court says:

"In this case the township embracing the land in question was surveyed in 1852, and subdivided into sections in 1854. *With this identification of the section the title of the State became complete unless there* HAD BEEN *a sale or other disposition of the property by the United States* PREVIOUS *to the compact with the State.* No *subsequent sale or other disposition* as already stated *could defeat the appropriation.*"

In what more unmistakable terms could the proposition of complainant be affirmed, that, the State being prior in right, the subsequent survey perfected and completed its title as against subsequent promises of the Government to the Indians?

The language quoted on page 49 of the defendant's brief from the Heydenfeldt case, that "until the status of the lands was fixed by survey Congress reserved absolute power over

them," &c., is not the statement of a *general principle*, but a statement of the *particular* status of lands in the State of Nevada with reference to *its* school-land grant.

The court found the school-land grant to Nevada in view of *its* peculiar terms, among other things expressing a grant *in præsenti*, when there were at the time no public lands in Nevada to be ambiguous, and properly construed it as leaving open to Congress any action it saw fit until after the sections were surveyed and segregated. Besides, it had relation to mineral rights always presumed to be reserved in the Government until the final vesting of title in a specific grantee.

The language of the court of somewhat similar import from the Minnesota case quoted in the Government's brief on the same page (49) must be read in connection with what preceded, expressly affirming the language of the Beecher case herein quoted, and particularly this sentence preceding the Government's quotation: "It is presumed that Congress will act in good faith, that it will not attempt to impair the scope of the school grant, *that it intends* that the State shall receive the *particular sections* or their equivalent in aid of its public-school system."

Congress has passed no law to affect the compact with the State. On the contrary, it and the executive department of the Government have permitted the right of the State in these particular sections to remain unchallenged for half a century, the first suggestion of any right in the Indians being made in 1899.

In 1854, with a then practically unlimited domain out of which to satisfy the request and desire—not the right—of

some of the Chippewa bands, for such a modification of the treaty of 1843 as would enable them to remain east of the Mississippi, can it be said that the United States was at liberty to assign or set apart or intended to assign and set apart to such bands particular lands which in the meantime it had by the highest and most solemn form of contract dedicated to the State of Wisconsin?

Can it be presumed that by designating a reservation for several small groups of Indians as a gratuity where specific or particular parcels were not of the essence nor of importance to the gift, where the primary purpose was distribution of lands in 80-acre tracts, to be followed by civilization, settlement on the allotted portions, and citizenship, the ending of hunting and fishing for a livelihood, and of the holding lands in common for the chase, bark and berry gathering, and other savage uses, it was intended that the particular land otherwise belonging to the State should be held in perpetuity for the descendants of such Indians?

III.

The treaty of 1854 expressly saved and secured all precedent rights conveyed or granted by the United States under the title acquired by it through the cession by the Indians in 1843.

Wisconsin became a Territory in 1836. Nearly half of its area consisted of this Indian country ceded in 1843. Between 1843 and 1854 it was inevitable that a multitude of scattered tracts within this territory would be disposed of to settlers, lumbermen, miners, and others by direct patent, the State admitted into the Union, with the customary grant of

school and swamp lands, and the advance of civilization and settlement penetrate into much of the country, taking up and developing lands in all sections of it. With the organization of the State, in 1848, settlement and improvement must and did make rapid strides. The treaty of 1854 recognized these conditions, and made provision by which the setting apart of reservations for certain of the Indians, contrary to the scheme of the treaty of 1843, which contemplated the removal of all of them west of the Mississippi, should not interfere with or overlap rights intermediately granted. It was accordingly expressly stipulated in article 3 of the treaty of 1854 that the President "may also make such changes in the *boundaries* of such reserved tracts or *otherwise* as shall be necessary *to prevent interference with vested rights.*" How could any vested rights arise as against the Indians or the United States if the Indians did not part with their title by the cession of 1843, or if their temporary occupancy of the whole tract, for hunting, &c., was tantamount to a retention of such title?

The conclusion is certain that under the treaty of 1843 the Indians reserved no title, and under the treaty of 1854 acquired no right to any *particular* land in the territory, that the intervening title granted by the United States to the State is paramount, and that the treaty of 1854 only promised the Indians the equivalent in area or acres of the reservations provided for.

In Gaines *vs.* Nicholson, 9 How., 365, the court says, *arguendo:*

"But the question here is, whether the reservation of a right, not to any particular parcel or section of the territory ceded, but a right, generally, to have that quantity of land out of it, and to be located under the direction of the President, stands upon the same footing and has the effect to cut

off the right claimed by the State to have attached under the acts of Congress to the school section previous to the location made by the President."

The State had a grant of explicitly designated portions of the land within the territory, not in every instance surveyed at the time of the grant, but unmistakably ascertainable by survey. As far as the lands in question are concerned, the enclosing township and range lines were actually surveyed by the Land Department prior to 1854.

IV.

The conditions in the case of Minnesota vs. Hitchcock, 185 U. S., 373, are entirely reversed in the present case.

In the Minnesota case the lands involved were *unceded* Indian lands at the date of Minnesota's admission into the union. Minnesota was admitted into the Union in 1857. It was stipulated in the Minnesota case that, except as its status was affected by a treaty of October, 1863, and an order of the President in 1879 and certain acts of Congress in 1889 and 1890 (185 U. S., 376), the lands in controversy continued to be unceded Indian lands, *subject to the* ORIGINAL *right of occupancy* up to March 4, 1890.

The land in question in that case, "the Red Lake Indian reservation," had been embraced in unceded Chippewa Indian country up to the year 1879, when it was expressly recognized as such by the President's order of March 18, 1879. As to that reservation, the Indian title was prior and precedent in time and in official recognition by the United States to the admission of Minnesota into the Union.

The congressional joint resolution of March 3, 1857, in response to the application of the Territory of Minnesota for admission into the Union expressly provided (185 U. S., 375) that "lands reserved for public uses before survey had been made, should have other lands substituted therefor, to be selected by the State."

The Wisconsin corresponding provision (subdiv. 1, art. 7, enabling act of August 6, 1846) provided that "where such section *had been* sold or otherwise disposed of, other lands, etc., should be granted."

How can it, with any countenance, be claimed that any of the school sections in the *after-created* Indian reservations *had been* sold or disposed of prior to 1848, the year of the grant to the State?

V.

In no possible view have the Indians more than a hunting and fishing privilege on these lands. The fee should be declared by this court to be in the State of Wisconsin, so as to assure to its grantees the title to the timber thereon, subject to no restraint or limitation, but if any, only such reasonable regulations as the Land Department might impose to protect temporary occupancy.

It is almost apparent from the location and valuation of the land in question that it is well timbered. Assuming an Indian right of temporary occupancy stretched beyond a period of 50 years, shall it still be effective to prevent the owner of the fee from appropriating the standing timber, which is part of the realty, by converting it into merchantable timber? By what process of reasoning can this tran-

sient right of occupation be construed at this time, when the lands held in common have practically been distributed and are held in severalty, be regarded as a bar to the fee owner's exercise of ownership over the timber?

As early as the case of United States *vs.* Cook, 19 Wall., 591, and in a multitude of cases since, the absence of title in the Indians to timber on lands occupied by them and the right of the United States as owner of the fee to maintain replevin for such timber when cut is established and recognized. Can it be said then that the State, the grantee of and successor to such fee, has not a similar right, resting on ownership? This last proposition is of special importance in case the court should hold that any right of occupancy at this late day exists in favor of any of these Indians on any of these school sections in Wisconsin as against the State or its grantees, as the bill shows that the claim of the Indians has been asserted by the present Secretary of the Interior in attempts to forbid and prevent the appropriation by such owners of such timber. In no event can any part of these lands ever be patented by the United States, for under all the authorities the fee is in the State of Wisconsin.

Is not the right of occupancy mentioned in article 2 of the treaty of 1843 to be deemed at an end after so great a lapse of time, or shall it, like the brook, "go on forever," in the absence of a specific order of removal by the President?

We insist that the demurrer of the defendant should be overruled on the broad ground that the title to the school sections in question is in the State of Wisconsin and its grantees unincumbered with any trust in the United States in favor of the Indians.

The Government in its brief suggests, without pressing the point, that the jurisdiction of this court may be defeated as to the lands said to be in the La Pointe Indian reservation, because the State is the complainant and alleges that it has issued patents on all school lands within that reservation's outer boundaries. A sufficient answer would seem to be that the bill is not divisible into sections, and the status of the other lands confessedly gives jurisdiction and takes the present one out of the category of moot cases. Besides, it has been often held that the *obligation* of the United States respecting relief invoked is sufficient to enable it to maintain an action to revoke a patent, and no reason is apparent why the same rule should not apply to a State.

U. S. *vs.* San Jacinto T. Co., 125 U. S., 273.

U. S. *vs.* Beebe, 127 U. S., 338.

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